A **SUNGAI BULOH PHOENIX OCEAN SDN BHD**

v.

PP

B HIGH COURT MALAYA, SHAH ALAM
YEOH WEE SIAM JC
[CRIMINAL APPEAL NO: 42-81-2008]
4 DECEMBER 2009

C ***TRADE MARKS:*** *Trade description - Prosecution of offence - Whether one-year time limit complied with - One-year to commence from date of discovery of offence - Whether date of discovery to be taken from date of commission of offence or date of sanction issued by prosecutor - Trade Descriptions Act 1972, s. 3(1)(b)*

D This was the appellant's appeal against the dismissal of its preliminary objection ('PO') raised before the sessions judge. In raising the PO, the appellant claimed that the prosecution was time-barred from proceeding with the prosecution of the appellant for the offence under s. 3(1)(b) of the Trade Descriptions Act E 1972 ('the Act'). This was because s. 19(b) of the Act stipulated a one-year time limit for the commencement of the prosecution. The date of the commission of the offence being 24 January 2006, the prosecution should have been instituted by the 23 January 2007. However, the summons was issued on 25 January 2007, F outside the time limit set by the Act. The trial judge decided that "prosecution" for the purposes of s. 19(b) referred to the date that the sanction to prosecute was issued on 29 December 2006 and not from the date of the summons issued on 25 January 2007. Therefore, the prosecution was within the one-year time G limit and accordingly dismissed the PO. In this appeal, the appellant submitted that there was no legal provision requiring a sanction to prosecute. Calculation of the one-year time limit could not be made with reference to the sanction. On the other hand, the Deputy Public Prosecutor ('DPP') submitted that the sanction H to prosecute was issued in accordance with s. 376 of the Criminal Procedure Code ('CPC'). It was not a sanction within the requirement of s. 129(1) CPC where certain types of offences required a sanction before prosecution could be commenced. The sanction in this case was more of an "authorization letter" I authorizing the prosecuting officer to prosecute in accordance with

art. 145 of the Federal Constitution. The issue before the court was whether the one-year time limit from the discovery of the offence by the prosecutor under s. 19(b) of the Act had expired so as to limit or bar the prosecution of the appellant for the offence.

Held (dismissing the appeal):

(1) The trial judge had erred in fact in stating that the date of the sanction to prosecute was 29 December 2006. In the appeal record, it was clear that the sanction was signed by the DPP on 19 January 2007 and not on 29 December 2006. Further, there was no evidence that the date of application for the summons was 23 January 2007 as submitted by the DPP. The DPP's oral submission that 23 January 2007 was the date of application for the summons did not amount to cogent evidence of such date. On record, there was no documentary or other evidence on when the application for the summons was made. There was only evidence that the summons was issued by the sessions court on 25 January 2007. (paras 14, 15 & 16)

(2) The appellant misinterpreted the time limit for the prosecution as imposed by s. 19(b) of the Act. He computed it from the date of the commission of the offence. The correct approach to interpret s. 19(b) of the Act was to determine when the prosecutor "discovered" the commission of the offence. Once that date was identified, the time limit of one year to commence prosecution would be calculated from that date. (paras 17 & 18)

(3) An assumption could not be made that the date of the commission of the offence was the date of discovery of the offence by the Prosecutor. That was because the enforcement officers were the ones who would detect the person that committed the offence. The Prosecutor, not being an enforcement officer, would not be the person to discover the commission of the offence until the matter was subsequently referred to him for a decision on whether to prosecute or not to prosecute. (para 19)

(4) There was no evidence of the Prosecutor's discovery of the offence except for the sanction to prosecute. The question then was whether such a sanction was valid and could be relied upon. There was no legal provision requiring a

sanction to prosecute under the Act. There was, however, the provision in s. 376(1) of the CPC which stated that the Attorney General shall be the Public Prosecutor and shall have the control and the direction of all criminal prosecutions and proceedings under the CPC. (paras 20 & 21)

(5) The sanction to prosecute in the present case was actually an "authorisation letter" issued for and on behalf of the Public Prosecutor ('PP') under s. 376 CPC. It was not a sanction to prosecute as sometimes required by legislation for example as in s. 129(1) CPC for the commencement of prosecution for certain offences. (para 22)

(6) Under s. 28B(3) of the Act, any prosecution for an offence under the Act might be conducted by an Assistant Controller. However, that provision could be struck down as being unconstitutional since under art. 145(3) of the Federal Constitution, only the Attorney General was vested with the power to institute, conduct or discontinue any criminal proceedings. In order to avoid a constitutional challenge of the Assistant Controller's power to conduct the prosecution of an offence under the Act, the sanction to prosecute therefore has to be issued by the DPP. (paras 23 & 24)

(7) As it was a legal necessity for the sanction to prosecute to be issued for the purpose of a prosecution under the Act, it went without saying that the sanction in this case was valid and ought to be accepted by any court. It was basically an authorisation letter stating that the Assistant Controller had been duly authorised by the DPP, and therefore the PP, to conduct the prosecution of an offence under this Act, thereby harmonising it with the provisions of art. 145(3) of the Federal Constitution and s. 376(1) CPC. (para 25)

(8) The sanction to prosecute was therefore cogent evidence that the prosecutor had "discovered" that the offence under this Act had been committed. The time limit of one year should therefore run from the date of discovery, *ie*, the date the sanction was issued on 19 January 2007. (para 26)

(9) The one-year time limit for the prosecution of an offence under s. 19(b) of the Act was therefore from 19 January 2007 to 18 January 2008. The one-year should not be effective from 24 January 2006 because that was the date of the commission of the offence, but not the date of discovery of the offence by the Prosecutor. (para 27)

(10) It was only upon discovery of the offence by the Prosecutor under s. 19(b) of the Act that an application for a summons can be made to the court. Pursuant to that application, the court would issue the summons. In a situation such as in the present case where there was already a sanction issued by the DPP, then that sanction should be relied upon for the purpose of s. 19(b). There was therefore no necessity to resort to the date of application of the summons or the date that the summons was issued, in order to determine the time limit set by s. 19(b). Accordingly, the prosecution of the appellant was not time-barred. (paras 28. 29 & 31)

Case(s) referred to:
Nguang Chan Sdn Bhd v. PP [2001] 2 CLJ 16 CA ***(refd)***
PP v. Lew Koy [2002] 1 CLJ 86 HC ***(refd)***
PP v. Sim Lee Kun [1995] 1 LNS 292 ***(refd)***
Tang Shew Kai v. Reg [1955] 1 LNS 159 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 129(1), 376(1), (3)
Federal Constitution, art. 145(3)
Trade Descriptions Act 1972, ss. 18(2), 19(b), 28B(3)

For the appellant - TK Lee; M/s YY Ho & Lee
For the respondent - Tuan Ishrakh Saad DPP

Reported by Usha Thiagarajah

JUDGMENT

Yeoh Wee Siam JC:

[1] This is an appeal by Sungai Buloh Phoenix Ocean Sdn. Bhd ("the appellant") in respect of the decision of the learned Sessions Court Judge ("the trial judge") regarding a preliminary objection raised at the commencement of the hearing before the trial judge in the Petaling Jaya Sessions Court Summons Case no. 63-3-2007 ("the summons case").

[2] The appeal was heard by me on 4 December 2009 after which I gave my decision on the same day.

[3] The appellant was charged as follows:

> Bahawa kamu pada 24/1/2006 kira-kira jam 11.20 pagi di Lot 43, Jalan Sungai Buloh, Kota Damansara, 47000 Selangor Darul Ehsan dalam perjalanan perdagangan telah membekalkan Pasu PVC berwarna emas jenama 'May' No. Siri G-280 sebanyak 4 unit yang baginya menggunakan Perihal Dagangan Palsu ke atas karektar fizikal dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 3(1)(b) Akta Perihal Dagangan 1972 dan boleh dihukum di bawah Seksyen 18(2), Akta yang sama (Akta 87).

[4] Learned counsel for the appellant ("learned counsel"), in the preliminary objection, submitted that the prosecution was time-barred under s. 19(b) of the Trade Descriptions Act 1972 ("the Act") from proceeding with the prosecution of the appellant in the summons case.

[5] Section 19(b) of the Act provides as follows:

> **Section 19. Time limit for prosecution**.
>
> No prosecution for an offence under this Act shall commence after the expiration of:
>
> (a) three years from the commission of the offence; or
>
> (b) one year from its discovery by the prosecutor,
>
> whichever is the earlier:
>
> Provided that it shall not be a bar to the commencement of a prosecution for an offence under this Act notwithstanding the expiry of the period specified in the above paragraph (b) if the Public Prosecutor certifies in writing that the accused by his own conduct contributed to the delay in the commencement of the prosecution.

[6] According to the trial judge, the chronology of events for the summons case is as follows:

29 December 2006	:	The sanction to prosecute was issued by the learned Deputy Public Prosecutor ("the DPP").
23 January 2007	:	The application was made to the Sessions Court for the issue of the summons.

25 January 2007 : The summons was issued and sealed by the Sessions Court.

[7] The trial judge decided that "prosecution" for the purpose of s. 19(b) of the Act refers to the date that the sanction to prosecute was issued (see appeal record p. 64), and not from the date that the summons was issued. Therefore, the expiration of the one year under s. 19(b) of the Act has to be ascertained from the date that the sanction to prosecute was issued and not from the date that the summons was issued. In view of that, the trial judge dismissed the preliminary objection of learned counsel since the sanction was issued on 29 December 2006 ie, within the time provided by the Act.

[8] The trial judge relied on the analogy given by Whyatt CJ in *Tang Shew Kai v. Reg* [1955] 1 LNS 159 as follows:

> It is necessary to have in mind at the outset that a summons is merely machinery to compel attendance in Court and that before any question of compelling a person's attendance can arise, a number of legal processes have to be completed in pursuance of the provisions of the Criminal Procedure Code. … If the issue of the summons were to be treated as the effective date for instituting proceedings, no prosecutor could be sure that they would be instituted within the statutory period since after making his complaint, the prosecutor no longer has any control over the time which elapses before the summons is actually issued. That depends upon the speed with which the machinery of the Courts is functioning at that particular juncture; it may take a very short time or it may take several days … In my judgment, proceedings were instituted in the present case when a complaint was made …

[9] The issue is whether the one year from the discovery of the offence by the prosecutor under s. 19(b) of the Act has expired so as to limit or bar the prosecution of the appellant for the offence.

Submissions Of Learned Counsel

[10] Learned counsel submitted as follows:

1. There is no legal provision requiring a sanction to prosecute. Calculation of the one year cannot be made with reference to the sanction.

2. The date of commission of the offence is 24 January 2006 ie, also the date that the prosecution discovered the alleged offence. Pursuant to s. 19(b) of the Act, prosecution should be instituted at the latest by 23 January 2007.

3. The summons was registered on 25 January 2007. Therefore, the prosecution was outside the time limit set by the Act.

[11] Learned counsel relied on the following two cases:

Public Prosecutor v. Sim Lee Kun [1995] 1 LNS 292 where it was held that prosecution commenced afresh from the date the second summons was registered.

PP v. Lew Koy [2002] 1 CLJ 86 where it was held that "The expiration of the 90 days specified in s. 19(1) of the Act was to be determined on the date when the complaint was filed in court by the Ministry of Health and not on the date when the respondent was charged in court ...".

[12] Submissions of the DPP

(1) The sanction to prosecute in this case was issued in accordance with s. 376(3) of the Criminal Procedure Code ("the CPC"). It is not a sanction within the requirement of s. 129(1) of the CPC where certain types of offences require a sanction before prosecution can be commenced.

Thus, the sanction in this case is more of an "authorization letter" to authorize the prosecuting officer to prosecute. This is in accordance with art. 145(3) of the Federal Constitution.

The difference between a sanction and an authorization letter has been explained clearly in *PP v. Lew Koy (supra)*.

(2) The "authorization letter" is required in order to avoid the *locus standi* of the prosecuting officer from being challenged. This was what happened in *Nguang Chan Sdn. Bhd. v. PP* [2001] 2 CLJ 16 where the Court of Appeal decided that even though s. 28B(3) of the Act clearly allowed an Assistant Controller of Trade Descriptions ("Assistant Controller") to conduct a prosecution in the Court, the prosecution was null and void and *ultra vires* art. 145(3) of the Federal Constitution.

(3) In p. 16 of the appeal record, it is stated that the application for summons was made on 23 January 2007 and the summons was issued on 25 January 2007. Based on that, the date of complaint or the application for the summons is 23 January 2007.

PP v. Lew Koy (supra) also referred to the views and principle in *Tang Shew Kai v. Reg.* [1955] 1 LNS 159 where it was stated that the date for commencement of a prosecution is the date the complaint is filed and registered.

(4) The date of commencement of prosecution in this case is within the time limit provided in the Act. The records show that the application for the summons was made on 23 January 2007 and the summons was issued on 25 January 2007.

Evaluation And Findings By The Court

[13] I note that none of the cases cited above by both parties are regarding s. 19(b) of the Act. As a result, those cases are not on all fours with this case. They are persuasive authorities, wherever relevant, but their decisions do not bind this court on the issue to be determined here.

[14] Before proceeding further, with respect, I find that the trial judge had erred in fact in stating that the date of the sanction to prosecute is 29 December 2006. In p. 64 of the appeal record, it is clear that the sanction was signed by the DPP on 19 January 2007, and not on 29 December 2006.

[15] Regarding the date of application for the summons, the DPP in his reply submissions in p. 16 of the appeal record informed the trial judge that such date is 23 January 2007. There was no challenge by learned counsel.

[16] Upon a thorough perusal of the appeal record, I find that what learned counsel submitted in this appeal is true ie, there is no evidence of the date of application for the summons being 23 January 2007. The oral submission of the DPP that 23 January 2007 is the date of application for the summons does not amount to cogent evidence of such date. On record, there is no documentary or other evidence on when the application for the summons was made. There is only evidence that the summons that was applied for was issued by the Sessions Court on 25 January 2007.

[17] With respect, it appears to me that learned counsel has misinterpreted the time limit for prosecution imposed by s. 19(b) of the Act. He went on the basis of computing the date that prosecution should end, based on the date of commission of the offence.

[18] The correct approach to interpret s. 19(b) of the Act is to determine when the prosecutor "discovered" the commission of the offence. Once that date is identified, then the time limit of one year to commence prosecution would be calculated from that date.

[19] It cannot be assumed that the date of commission of the offence is the date of discovery of the offence by the prosecutor. This is because enforcement officers are the ones who detect the person who commits the offence. The prosecutor, not being an enforcement officer, would not be the person to discover the commission of the offence until the matter is subsequently referred to him for a decision whether to prosecute or not to prosecute.

[20] There is no evidence of the prosecutor's discovery of the offence except for the sanction to prosecute. The question then is whether such a sanction is valid and can be relied upon.

[21] I agree with learned counsel that there is no legal provision requiring a sanction to prosecute under the Act. There is, however, the provision in s. 376(1) of the CPC which states that the Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under the CPC.

[22] As explained clearly in *PP v. Lew Koy (supra)*, the sanction to prosecute given in the present case is actually an "authorization letter" issued for and on behalf of the Public Prosecutor under s. 376 of the CPC. It is not a sanction to prosecute that is sometimes required in legislation, eg, s. 129(1) of the CPC, for commencement of prosecution for certain offences.

[23] Under s. 28B(3) of the Act, any prosecution in respect of an offence under the Act may be conducted by an Assistant Controller. However, this provision can be struck down as being unconstitutional, as in the case of *Nguang Chan Sdn. Bhd. v. PP (supra)* since under art. 145(3) of the Federal Constitution only the Attorney General is vested with the power to institute, conduct or discontinue any criminal proceedings.

[24] In order to avoid a constitutional challenge of the Assistant Controller's power to conduct the prosecution of an offence under the Act, the sanction to prosecute therefore has to be issued by the DPP in this case.

[25] Having established by the above that it is a legal necessity for the sanction to prosecute to be issued for the purpose of a Prosecution under this Act, it goes without saying that the sanction in this case is therefore valid and ought to be accepted by any court. It is basically an authorization letter stating that the Assistant Controller has been duly authorized by the DPP, and therefore the Public Prosecutor, to conduct the prosecution of an offence under this Act, thereby harmonising it with the provisions of art. 145(3) of the Federal Constitution and s. 376(1) of the CPC.

[26] The sanction to prosecute is therefore cogent evidence that the prosecutor has "discovered" that the offence under this Act has been committed. The time limit of one year should therefore run from the date of discovery ie, date that the sanction was issued or dated by the DPP, namely 19 January 2007.

[27] The time frame of one year for the prosecution of an offence under s. 19(b) of the Act is therefore from 19 January 2007 to 18 January 2008. The one year should not be effective from 24 January 2006 because that is the date of commission of the offence, but not the date of discovery of the offence by the prosecutor.

[28] It is only upon discovery of the offence by the prosecutor under s. 19(b) of the Act that an application for a summons can be made to the court. Pursuant to that application, the court would issue the summons. In a situation such as in the present case where there is already a sanction issued by the DPP, then that sanction should be relied upon for the purpose of s. 19(b) of the Act. There is therefore no necessity to resort to the date of application of the summons, or the date that the summons was issued, in order to determine the time limit of the one year set by s. 19(b) of the Act.

[29] The records show that appellant was charged in the Sessions Court on 7 March 2007. This means that the prosecution of the appellant for the offence under the Act

commenced within the period of 19 January 2007 to 18 January 2008, therefore well within the one year limit set by s. 19(b) of the Act.

[30] Other than the factual error regarding the date of the sanction to prosecute, I find that the trial judge did not err in law in her actual decision on the preliminary objection even though I do not agree with her line of reasoning where she started off in a roundabout way of determining "prosecution" in relation to the date of the sanction as opposed to the date of issue of summons by the court. She should have just zeroed directly onto the issue of determining what is the date of the discovery of the offence by the prosecution in order to calculate when the one year time limit for prosecution commences (see appeal record pp. 61 and 62).

[31] Accordingly, I hold that the prosecution of the appellant in this case is not time-barred. The preliminary objection of learned counsel for the appellant is without any legal basis.

[32] The appeal of the appellant is dismissed.

[33] The court further orders that the hearing of the summons case be proceeded with in the Petaling Jaya Sessions Court.